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No. 73-248

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In the Supreme Court of the United States

OCTOBER TERM, 1973

FIELD C. MCCORD, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners are the parents and the executors of the estate of a deceased serviceman. They brought suit against the United States under the Federal Tort Claims Act to recover damages resulting from the serviceman's death when he was accidentally shot by another serviceman who was cleaning his weapon. At the time of the accident, both servicemen were on active duty and performing assigned duties as military policemen. The district court dismissed the suit on the authority of *Feres* v. *United States*, 340 U.S. 135 (Pet. App. A1-A3). The court of appeals affirmed (Pet. App. A4-A5).

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for injuries to servicemen which are sustained in the course of activity

incident to their service (340 U.S. at 146).[1] The holding of *Feres* is directly applicable here, since McCord's death resulted from activity which was directly related to his military service. While petitioners alleged that Army regulations barred the cleaning of weapons at the particular location of the accident, it is still true, as the district court noted, that "the cleaning of weapons is an activity which is commonplace in military life," and that "the accident resulted from activities engaged in by active duty personnel in the course of military duty" (Pet. App. A3).

The dismissal of petitioners' suit is fully consistent with the rulings of this Court that *Feres* does not apply when the injuries are sustained in an accident which occurs when the serviceman is on leave, and which is thus totally unrelated to his military duty (*Brooks* v. *United States*, 337 U.S. 49), or when the injury occurs after discharge (*United States* v. *Brown*, 348 U.S. 110). As this Court declared in *Brown* (348 U.S. 113):

> We adhere * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty.

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[1] The Court rejected an interpretation of the Act which would permit tort claims arising out of non-combatant activities (340 U.S. at 138) and emphasized the special compensation system, which normally requires no litigation, provided by Congress for servicemen and their families (*id.* at 144), describing it as "not negligible or niggardly" (*id.* at 145).

The "assault" exception to the Tort Claims Act, discussed at length in the petition for a writ of certiorari (Pet. 7-9), was not a basis for either decision below.

See also *Johansen* v. *United States*, 343 U.S. 427; *Patterson* v. *United States*, 359 U.S. 495; *United States* v. *Demko*, 385 U.S. 149.[2]

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[2] The federal courts have consistently followed the teachings of *Brooks*, *Feres*, and *Brown*. A contrary decision by a district court in *Lee* v. *United States*, 261 F. Supp. 252 (C.D. Calif.), upon which petitioners rely (Pet. 11-12), was reversed by the Ninth Circuit in *United States* v. *Lee*, 400 F. 2d 558, certiorari denied, 393 U.S. 1053, stating (400 F. 2d at 561):

> Congress has not seen fit to amend the Tort Claims Act * * *, permitting the [*Feres*] decision to remain undisturbed for eighteen years. * * * This circuit in *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942, cert. denied, 350 U.S. 827, * * * stated at page 945, concerning the *Feres* case:
>
> > The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to the congressional intent in the adoption of the Act.

In *Hale* v. *United States*, 452 F. 2d 668 (C.A. 6) and *Buer* v. *United States*, 241 F. 2d 3 (C.A. 7), also cited by petitioners (Pet. 12-14), *Feres* was held to bar the suits in question.